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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LINO GARCIA, JR., Defendant and Appellant.	E049697 (Super.Ct.No. SWF028292) OPINION

APPEAL from the Superior Court of Riverside County. Rafael A. Arreola, Judge. (Retired judge of the San Diego Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Lino Garcia, Jr., was charged in a single count information with transportation of a controlled substance under Health and Safety Code

section 11352, subdivision (a). The information also alleged that defendant transported more than 10 kilograms by weight of cocaine under Health and Safety Code section 11370.4, subdivision (a)(3).

A jury convicted defendant as charged. The jury also found the weight enhancement to be true.

Defendant waived an updated probation report and was sentenced immediately following the return of the jury verdict. Defendant was sentenced to a prison term of 13 years as follows: the low term of three years for the substantive offense, plus a consecutive term of 10 years for the weight enhancement.

Defendant appeals.

I

FACTUAL AND PROCEDURAL HISTORY

About 10:00 a.m. on April 2, 2009, defendant was driving a Ford Explorer northbound on Interstate 15. The United States Border Patrol checkpoint located south of Temecula was active at that time. When defendant was three cars away from Agent Bradley Voss, the agent noticed that defendant was gripping the steering wheel very tightly, and was looking around "like a trapped animal." As defendant approached, Agent Voss noticed that defendant became even more nervous and distraught. The agent was concerned that defendant would "drive away quickly before [the agent] could ask him any questions." Agent Voss asked defendant where he was going. In response, defendant stated he was going to Washington. When Agent Voss asked whether defendant meant

Washington State or Washington, D.C., defendant stated he was going to a hospital on Washington Street.

Agent Voss ordered defendant to drive to the secondary inspection station where he was met by Agent Nirey Del Toro. Agent Del Toro also noticed that defendant looked nervous, and observed that defendant was breathing deeply, was avoiding eye contact, was shaky, and was quivering his lower lip. Defendant told Agent Del Toro that he was coming from Calexico, and going to the USC hospital in San Diego. The agent became suspicious as the USC hospital is in Los Angeles, and defendant was traveling in the opposite direction of San Diego. After securing defendant's consent, Agent Del Toro called for the K-9 unit to sniff the exterior of defendant's car.

While waiting for the K-9 unit to arrive, Agent David Fulton was assigned to monitor defendant to ensure that defendant did not interfere with the K-9 activity. Defendant appeared to be very nervous and told Agent Fulton that he was on his way to Los Angeles to visit his father in the hospital.

When the dog alerted positively for drugs in the Explorer, a full search of the interior of the vehicle commenced. Police eventually found 17 bundles hidden in the car; 14 between the rear seat and rear window, and three hidden inside the rear passenger door.

The parties stipulated that the seized items had a total weight of 17 kilograms and contained cocaine, and was of usable quantity.

II

ANALYSIS

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436, and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of the case, a summary of the facts, and potential arguable issues and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. In his 12-page supplemental brief, defendant contends that he received ineffective assistance of counsel (IAC). Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error.

We hereby address defendant's IAC claim. In order to establish a claim of IAC, defendant must demonstrate, "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 430.) Hence, an IAC claim has two components: deficient performance and prejudice. (*Strickland v. Washington*, *supra*, at

pp. 687-688, 693-694; *People v. Williams* (1997) 16 Cal.4th 153, 214-215; *People v. Davis* (1995) 10 Cal.4th 463, 503; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) If defendant fails to establish either component, his claim fails.

When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

In this case, defendant contends that his counsel rendered IAC because counsel failed to allow defendant to testify on his own behalf, and failed to allow his girlfriend to testify. Defendant claims that he informed his counsel "that he wanted to take the stand and inform his jury that he had no knowledge of the contraband hidden in the Ford Explorer. He wanted to tell his jury that he and his girlfriend anticipated purchasing said vehicle and that he was merely test driving the day in question." His girlfriend would have corroborated defendant's testimony: She would have testified that she and defendant "anticipated purchasing the Ford Explorer, and that [defendant] was merely test driving the vehicle."

We cannot say that "there simply could be no satisfactory explanation" for counsel's refusal to put defendant or his girlfriend on the stand. (*People v. Pope*, *supra*, 23 Cal.3d at p. 426.) In fact, defendant states that his counsel did not allow defendant to take the stand because (1) defendant would be impeached by "the alleged inconsistent statements he made to the agents"; (2) no one would believe defendant; and (3) defense

counsel "did not need to put on any defense as the prosecution had failed to prove [defendant's] guilt beyond all reasonable doubt." Given the facts of this case, we cannot say that counsel's tactical decision—not to allow defendant to testify based on the reasons cited by defendant—was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms. Moreover, defense counsel did not render IAC in not allowing defendant's girlfriend or defendant to testify because the story—that defendant was only "test driving" the vehicle—simply did not make sense and could have hurt defendant's case. Here, defendant was in the Ford Explorer at the border checkpoint. Three separate agents testified that defendant looked nervous and was shaking. At no time did defendant mention that he was test driving the vehicle. Instead, defendant gave inconsistent statements to the agents regarding his final destination. Therefore, counsel's decision in not allowing either defendant or his girlfriend to testify did not fall below an objective standard of reasonableness under prevailing professional norms.

Furthermore, defendant cannot demonstrate that counsel's alleged deficient representation prejudiced him, i.e., there is a reasonable probability that, but for counsel's purported failings, defendant would have received a more favorable result. (*People v. Dennis*, *supra*, 17 Cal.4th at pp. 540-541; *Strickland v. Washington*, *supra*, 466 U.S. at p. 687.)

III

DISPOSITION

The judgment is affirmed.

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/s/ McKinster
Acting P.J.

We concur:

/s/ King
J.

/s/ Miller
J.